IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1420

ROUNDHOUSE CONSTRUCTION CORPORATION,
Petitioner

vs.

TELESCO MASONS SUPPLIES CO., ET ALS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Roundhouse Construction Corporation, prays that a Writ of Certiorari be issued to review the judgment of the Supreme Court of the State of Connecticut which, upon remand from the United States Supreme Court (Roundhouse Construction Corp. v. Telesco,____US___, 96 SCt 20, 46 L. Ed 2d 29), determined that its prior judgment was based upon both Federal and State Due Process grounds.

I. PRIOR UNITED STATES SUPREME COURT ACTION

Upon a prior application for a Writ of Certiorari (#75-46) the United States Supreme Court granted Certiorari, vacated the judgment of the Supreme Court of Connecticut, remanded the matter to that court to determine whether its judgment was based upon Federal or State Due Process constitutional grounds, or both.

II. OPINION BELOW

The most recent opinion of the Supreme Court of Connecticut dated January 27, 1976, is published in 37 *Conn. L.J.* No. 31. A stay of execution was granted on February 9, 1976. A permanent official citation is not yet available. (The decision is set forth in Appendix A).

The prior decision of the Supreme Court of the State of Connecticut published in 36 *Conn. L.J.* No. 43, p. 1 (April 22, 1975, 168 Conn.____) was set forth in full in Appendix A to the prior application for a Writ of Certiorari (#75-46).

The original decision of the Superior Court of the State of Connecticut (Fairfield County at Bridgeport, No. 152255), entered on June 20, 1974 and not officially reported, was set forth in Appendix B to the prior application for Writ of Certiorari (#75-46).

III. JURISDICTION

The jurisdiction of the Supreme Court is invoked under Rule 19(a) of the Rules of the Supreme Court and Title 28 United States Code, Section 1257(3) on the grounds that review is sought by the Supreme Court of the United States by a Writ of Certiorari of a judgment of affirmance on appeal by the Supreme Court of the State of Connecticut, which judgment was dated January 27, 1976.

IV. QUESTIONS PRESENTED

1A. Does the Connecticut statutory scheme providing for the filing and enforcement of Mechanic's Liens violate the Due Process Clause of the 14th Amendment to the Constitution of the United States, and Article First, Section 10 of the Constitution of the State of Connecticut, because of the failure of the statutes involved to provide for notice and hearing;

1B. Does the filing of a Mechanic's Lien constitute a 'taking of property' entitling one whose property is liened to the protection afforded by the Due Process Clause of the 14th Amendment and the related State Constitutional provision; and,

2. In civil matters, can a state court find independent state Due Process grounds for a decision where it has consistently held that its 'Due Process' clause is coextensive with the Federal Due Process clause and is not susceptible to definition without reliance on Federal Court interpretation of the Federal Due Process clause?

V. CONSTITUTIONAL PROVISIONS AND STATE STATUTES

U.S. Constitution – 14th Amendment (Due Process Clause)

Constitution of the State of Connecticut – Article First, Section 10 (Due Process Clause)

Connecticut General Statutes, Title 49, Sections 33 through 40(a) (Mechanic's Lien Statutes, Appendix B).

VI. STATEMENT OF CASE

Applicant Roundhouse Construction Corporation caused a mechanic's lien to be filed on the Land Records of the Town of Ridgefield, County of Fairfield, State of Connecticut. Said lien was indexed against property of Fisher. Under the statutory scheme then valid, no notice nor opportunity to be heard prior to the filing of the lien was given to the property owners.

The statutory scheme provides that a foreclosure of said lien must be commenced within two (2) years of the filing date and Roundhouse did commence its action to foreclose within the statutory period.

It is possible that Fisher had no knowledge of the existence of the lien until being served with the foreclosure action since actual notice to them until the commencement of foreclosure is not required. A title examination could, theoretically, be the only source of knowledge to the liened party until a foreclosure was begun.

Fisher, by Order to Show Cause, sought to enjoin the foreclosure of the mechanic's lien and contested the validity of the lien itself, claiming that the Connecticut statutory provisions are unconstitutional.

The Superior Court of the State of Connecticut (Berdon, J.) granted Fisher's Application for Injunction and held that the lien of the applicant Roundhouse was void because the statute

under which the lien was filed was unconstitutional. The full opinion is set out in Appendix B to the prior Application for Writ of Certiorari (#75-46).

The Supreme Court of the State of Connecticut, in a lengthy opinion, affirmed, specifically concurring with the lower court finding that a taking did occur and holding that the mechanic's lien provisions of the Connecticut General Statutes were unconstitutional in that they violated the Due Process Clause of both the Constitution of the State of Connecticut and the 14th Amendment of the United States Constitution. The full opinion is set out in Appendix A to the prior Application for Writ of Certiorari, (#75-46).

On Application for Writ of Certiorari, the United States Supreme Court granted Certiorari, vacated the judgment of the Supreme Court of the State of Connecticut, remanded the matter to that court to determine whether its judgment was based upon State or Federal Due Process constitutional grounds or both.

The Supreme Court of the State of Connecticut by judgment dated January 27, 1976 (published in Volume XXXVII, No. 31 of the *Conn. L.J.*) found that its original judgment was based upon both Federal and State Due Process grounds and re-affirmed its original judgment. (The full opinion is set out in Appendix A).

VII. ARGUMENT

1 A & B. Does the Connecticut statutory scheme violate the 14th Amendment Due Process Clause of the United States Constitution and by concomitant definition, the related provisions of the Constitution of the State of Connecticut?

This question has, by implication, already been answered in the negative. In *Spielman-Fond, Inc. v. Hanson's, Inc.*, 379 F. Supp. 997 (D. Ariz) aff'd, 417 U.S. 901, a three judge District Court of the District of Arizona found the Arizona statutory

scheme relating to mechanic's liens valid. The Due Process Clause of the 14th Amendment was squarely faced and no violation thereof was found. The United States Supreme Court affirmed this decision without opinion.

The Arizona statutory scheme in relation to mechanic's lien laws (A.R.S. §33-981, et seq.) is substantially similar to the Connecticut scheme, except that the maximum duration of the lien without commencement of foreclosure is limited to six (6) months in Arizona against two (2) years in Connecticut.

The Arizona District Court reviewed those Supreme Court cases dealing with the general topic of a property deprivation without a meaningful hearing within a meaningful time. (*Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed2d 556; *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed2d 113; *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1111, 25 L. Ed2d 287; *Snaidach v. Family Finance Corp.*, 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed2d 349). However, the court was not persuaded of the applicability of those cases because it found, as a matter of law, that the filing of the mechanic's lien under the Arizona statutes did not constitute a deprivation. Without a deprivation or taking, so their rationale continues, the requirements of the Due Process Clause do not come into play.

It was this opinion of a three judge District Court in Arizona that the United States Supreme Court affirmed without opinion. (417 U.S. 901, 94 S. Ct. 2596, 41 L. Ed.2d 208). The obvious interpretation, rightly or wrongly, that has to be put on this is that the United States Supreme Court implicitly found that the economic impingement caused by the mechanic's lien filed without notice and hearing was of relatively minor consequence and that there was no violation of due process. One has to conclude that if a 'taking' has not occurred, it does not matter what procedure is followed either before or after the filing.

In addition, the Federal District Court, in South Dakota, upheld the constitutionality of South Dakota's scheme (*Cook v.*

Carlson, 364 F. Supp. 24 (S.D.S.D.) as did a court in Florida (*Ruocco v. Brinker*, 380 F. Supp. 432 (S.D. Fla.). Thus courts have upheld the constitutionality of such statutes generally and they have specifically supported the mechanic's lien laws of Arizona, which are substantially similar to those in Connecticut.

In addition, various state courts have had an opportunity to pass on the question since the first application for Writ of Certiorari was taken.

The Supreme Court of Georgia has upheld the validity of its statutes, similar to those held unconstitutional in Connecticut (*Tucker Door and Trim Corp. v. Fifteenth St. Company*, #30342, decided December 2, 1975). The court specifically rejected comparison to the line of cases involving seizure of property without prior notice or hearing. The court states (p. 2) that the filing for record of the claim of materialmen's lien does not deprive the owners of possession of their property. It is not until foreclosure of the lien after full judicial proceeding, that any judgment attaches to the property.

In California, a case involving the constitutionality of its state mechanic's lien laws is presently pending (*Connolly Development Inc. v. Diamond International*, 5th Civil #2057, reported below in 116 Cal. Rptr. 191). That case was argued on March 5, 1975 before the California Supreme Court. Although, as of the time this Application has gone to print more than one year has passed, the California Supreme Court has not reached a decision, one wonders if the delay is due in part, at least, to prior and present proceedings before the United States Supreme Court.

In a Connecticut case that arose in the Federal District Court, also now pending (*Brookhollow Associates v. Greene*, 389 F. Supp. 1322, D. Conn. 1975) the Federal District Court refused to convene a three judge court, finding that the *Spielman-Fond* case, (supra) was controlling upon it and thence necessarily finding the question insubstantial. The court logically found

that if it convened a three judge court, such a court would be bound by Spielman-Fond. It may be noted that the court was aware of the original Roundhouse decision (supra) but held it not binding on the Federal District Court.

To confuse matters, the Circuit Court of Appeals for the 2nd Circuit reversed and remanded the Brookhollow case to the lower court for judgment not inconsistent with the Roundhouse case, Court of Appeals, #75-7172 (2nd Cir.) (Dec. 4, 1975). No doubt the history of this case is not yet complete.

With cases pending in a number of jurisdictions, all to the same import, it would seem important for the United States Supreme Court to grant Certiorari and to consider this case to determine once and for all a question of vital importance to the housing and construction industry nationwide. The limits of the consumer-oriented protectionist decisions between 1969 and 1973 also need clarification and limitations in the area of mechanic's liens.

2. In normal linguistic use, under circumstances controlling here, would a decision based on State Due Process grounds only be able to stand on its own, if the Federal Due Process question was not raised?

The Supreme Court of the State of Connecticut is, like any other court, bound by its precedent. It has, repeatedly, identified its State Constitutional Due Process Clause with its Federal counterpart. In fact, the identity is coterminous denying the possibility of a separate and distinct meaning. "We have held that these provisions have the same meaning and impose similar constitutional limitations." (*Cyphers v. Allen*, 142 Conn. 699, 703, *Katz v. Brandon*, 156 Conn. 521, 537).

In fact, in the most recent Roundhouse case (Appendix A) the court went on to say, "We adhere to our prior decisions that the Due Process of Law clauses in both Constitutions have the same meaning." In another recent Connecticut case (*Page v.*

Welfare Comm., 37 *Conn. L.J.* No. 35 (February 24, 1976,) the court, in comparing the equal protection clause of the State and Federal Constitutions, came to the same conclusion that it had in considering the Due Process clause, that words used similarly have to have the same definition, and can only be defined by reference to the Federal interpretation.

The question remains and is a nagging one – if the pleadings did not raise the Federal Due Process question but only the State Due Process question, could the State Supreme Court have made a decision based on State Due Process grounds only? The answer, likely to somewhat disturb the State-Federal relationship, is clearly in the negative. As long as words, used in the same context, have to have the same meaning (as the Connecticut Supreme Court has stated) a finding or judgment on one ground implies a finding or judgment on the other ground, whether raised or not. See *Hurtado v. California*, 110 U.S. 516, where the Due Process Clauses of the 5th and 14th Amendment are compared.

Since Connecticut, for purposes of definition, has relied on Federal intrepretation of its Due Process Clause, it has, by implication, bound itself to limitations imposed on its own Due Process Clause by Federal Court decisions. Therefore, consideration of its Due Process Clause alone and without a concurrent consideration of the Federal Due Process clause becomes an impossibility.

VIII. CONCLUSION

It is unquestioned that a conflict exists between the Spielman-Fond case (supra) and the conclusions of the lower court in this case. Because of the importance of the Mechanic's Lien laws to the construction industry, the practical and legal questions raised are of vital concern in state courts throughout the 50 states. Only the United States Supreme Court can make a conclusive determination of the issues presented. The balancing

tests developed by a number of lower courts in upholding the constitutionality of their Mechanic's Lien laws mandate a full hearing by the United States Supreme Court as the only body capable of finally deciding the equities. A further balancing must determine the rights of a party who suffers minimally because of a filing of a Mechanic's Lien and the rights of a huge and diverse industry which has relied upon the Mechanic's Lien laws of the several states as strong and necessary protection not readily available in other ways.

The number of cases presently on the docket in various stages of proceeding in both State and Federal courts around the country becomes the single loudest voice in favor of a ruling by the Supreme Court of the United States.

The Petitioner claims that the Mechanic's Lien laws of the State of Connecticut are constitutionally sound, that they do not violate the protection afforded by the 14th Amendment to the United States Constitution and that the serious and significant constitutional questions raised by the Supreme Court of the State of Connecticut must be further heard and decided.

WHEREFORE, the Petitioner prays that the United States Supreme Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1975

NO. .....

ROUNDHOUSE CONSTRUCTION CORPORATION,
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vs.

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APPENDIX

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APPENDEX A

CONNECTICUT REPORTS

SUPREME COURT

December Term, 1975

ROUNDHOUSE CONSTRUCTION CORPORATION *v.* TELESCO MASONS SUPPLIES COMPANY, INC., ET AL.

Action for the foreclosure of a mechanic's lien, brought to the Superior Court in Fairfield County, where the defendants Fischer by counterclaim and cross complaint sought damages, invalidation of mechanics' liens filed by the plaintiff and the other defendants, and an injunction to restrain the imposition of those liens, and the issues were tried to the court, *Berdon, J.;* judgment for the defendants Fischer granting an injunction and invalidating the liens, from which only the plaintiff appealed to this court, which found no error. The plaintiff petitioned the United States Supreme Court for a writ of certiorari and that court vacated the judgment and remanded the case for further consideration. *No error.*

David S. Grossman, with whom, on the brief, was *Sidney Burger,* for the appellant (plaintiff).

Herbert V. Camp, Jr., for the appellees (defendants Fischer).

William W. Sprague filed a brief as amicus curiae.

HOUSE, C. J. Our first opinion in this case is reported in 168 Conn. (36 Conn. L.J., No. 43). We found no error in the judgment of the Superior Court for Fairfield County (*Berdon, J.*) which, in an action for the foreclosure of a mechanic's lien,

rendered judgment for the defendants on a counterclaim and cross complaint which sought an invalidation of the plaintiff's lien and an injunction to restrain the imposition of the lien. In sustaining the judgment of the trial court, we commented: "The court, filing a well-reasoned memorandum of decision, found the Connecticut mechanic's lien statutes[1] unconstitutional as violative of the due process clauses of the fourteenth amendment to the constitution of the United States and article first, § 10, of the constitution of Connecticut and rendered judgment enjoining the plaintiff and the other four lienor defendants from maintaining their mechanics' liens on the Fischer property and declaring the liens to be invalid."

Upon the issuance of our decision, the plaintiff petitioned the United States Supreme Court for a writ of certiorari and on that petition that court entered the following order: "The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the Supreme Court of Connecticut to consider whether its judgment is based upon federal or state constitutional grounds, or both. See *California* v. *Krivda,* 409 U.S. 33, 93 S. Ct. 32, 34 L. Ed. 2d 45, (1972)." *Roundhouse Construction Corporation* v. *Telesco Masons Supplies Co.,* U.S. , 96 S. Ct. 20, 46 L. Ed. 2d 29.

Our decision was based upon both due process clauses—that contained in the fourteenth amendment to the federal constitution and that contained in article first, § 10, of the constitution of Connecticut. As we stated in the opinion: "The decisive issue on the appeal is whether the Connecticut statutory procedure governing mechanics' liens is

unconstitutional because it does not comply with the due process of law requirements of the fourteenth amendment to the federal constitution and article first, § 10, of the Connecticut constitution. 'We have held that these provisions of the federal and state constitutions have the same meaning and impose similar constitutional limitations.' *Cyphers* v. *Allyn,* 142 Conn. 699, 703, 118 A.2d 318; *Katz* v. *Brandon,* 156 Conn. 521, 537, 245 A.2d 579." To the latter citations may be added the following, holding to the same effect: *State* v. *Doe,* 149 Conn. 216, 226, 178 A.2d 271; *Proctor* v. *Sachner,* 143 Conn. 9, 17, 118 A.2d 621; *State ex rel. Brush* v. *Sixth Taxing District,* 104 Conn. 192, 195, 132 A. 561.

As we further noted in the opinion: "The appeal raises for the first time in this court a question as to the constitutionality of Connecticut's mechanic's lien procedure. The United States Supreme Court, however, has recently had occasion to consider the constitutionality of the attachment, garnishment, sequestration and mechanic's lien procedures in several states, and the decisions of that court guide and must control our decision."

Since our court had had no prior occasion to consider the constitutionality of the Connecticut mechanic's lien statutes in the light of the due process of law provisions of both the federal and state constitutions and since, as we have already several times indicated, those provisions of both constitutions have the same meaning and since the United States Supreme Court had had occasion to consider the application of those requirements in similar circumstances, we analyzed the holdings and reasoning of the decisions of that court which would be at least very persuasive if not controlling authority.

There is no need to repeat what we said in our opinion or again to cite the authorities upon which we relied. The plaintiff in its petition for certiorari accurately summarized our decision and correctly represented to the United States Supreme Court that "[t]he Superior Court of the State of Connecticut granted Fischer's Application for Injunction and held that the lien of the applicant Roundhouse was void because the statute under which the lien was filed was unconstitutional. The Supreme Court of the State of Connecticut, in a lengthy opinion, affirmed, specifically concurring with the lower court finding that a taking did occur and holding that the Mechanic's Lien provisions of the Connecticut General Statutes were unconstitutional in that they violated the Due Process Clause of *both* the State of Connecticut and the 14th Amendment to the United States Constitution." (Emphasis supplied.)

In specific conformity with the direction of the remand from the United States Supreme Court, we have considered whether our judgment was "based upon federal or state constitutional grounds, or both." We adhere to our prior decisions that the due process of law clauses in both constitutions have the same meaning and, based upon that meaning of the due process of law clauses contained in both the federal and state constitutions, we reaffirm our prior judgment and find no error in the judgment of the Superior Court.

APPENDEX B

Sec. 49-33. Mechanic's lien. Precedence. Rights of subcontractors. If any person has a claim for more than ten dollars for materials furnished or services rendered in the construction, raising, removal or repairs of any building or any of its appurtenance or in the improvement of any lot or in the site development or subdivision of any plot of land, and such claim is by virtue of an agreement with or by consent of the owner of the land upon which such building is being erected or has been erected or has been moved, or by consent of the owner of the lot being improved or by consent of the owner of the plot of land being improved or subdivided, or of some person having authority from or rightfully acting for such owner in procuring such labor or materials, such building, with the land on which it stands or such lot or in the event that such materials were furnished or services were rendered in the site development or subdivision of any plot of land, then such plot of land, shall be subject to the payment of such claim. Such claim shall be a lien on such land, building and appurtenances or lot or in the event that such materials were furnished or services were rendered in the site development or subdivision of any plot of land, then on such plot of land and shall take precedence over any other encumbrance originating after the commencement of such services, or the furnishing of any such materials, subject to apportionment as provided in section 49-36. If any such liens exist in favor of two or more persons for materials furnished or services rendered in connection with the same construction, raising, removal or repairs of any building or any of its appurtenances, or in the improvement of any lot, or in the site development or subdivision of any plot of land no one of such persons shall have any priority over another except as hereinafter provided. If any instrument constituting a valid encumbrance upon such land other than a mechanic's lien is filed for record while such building is being constructed, raised, removed or repaired, or such lot is being improved, or such plot of land is being improved or subdivided, all such mechanic's liens originating prior to the filing of such instrument for record shall take precedence over such encumbrance and no such lien shall have priority over any other such lien, but such encumbrance and all such liens shall take precedence over any mechanic's lien which originates for materials furnished or services rendered after the filing of such instrument for record, but no one of such liens originating after the filing of such instrument for record shall have precedence over another. If any lienor waives or releases his lien or claim of precedence to any such encumbrance, such lien shall be classed with and have no priority over liens originating subsequent to such encumbrance. No mechanic's lien shall attach to any such building or its appurtenances or to the land on which the same stands or to any lot or to any plot of land, in favor of any subcontractor to a greater extent in the whole than the amount which the owner has agreed to pay to any person through whom such subcontractor claims subject to the provisions of section 49-36. Any such subcontractor shall be subrogated to the rights of the person through whom such subcontractor claims, except that such subcontractor shall have such a lien or right to claim such a lien in the event of any default by such person subject to the provisions of sections 49-34, 49-35 and 49-36, provided the total of such lien or liens shall not attach to any building or its appurtenances, or to the land on which the same stands or to any lot or to any plot of land, to a greater amount in the whole than the amount by which the contract price between the owner and such person exceeds the reasonable cost, either estimated or actual, as the case may be, of satisfactory completion of the contract plus any damages resulting from such default for which such person might be held liable to the owner and all bona fide payments, as defined in section 49-36, made by the owner before receiving notice of such lien or liens. In the case of the removal of any building, no such mechanic's lien shall take precedence over any encumbrance upon the land to which such building has been removed which accrued before the building was removed upon the land. Any mechanic's lien may be foreclosed in the same manner as a mortgage.

Sec. 49-34. Certificate of lien to be recorded. No such lien shall be valid, unless the person performing such services or furnishing such materials, within sixty days after he has ceased to do so, lodges with the town clerk of the town in which such building, lot or plot of land is situated a certificate in writing, describing the premises, the amount claimed as a lien thereon and the date of the commencement of the performance of services or furnishing of materials, stating that the amount claimed is justly due, as nearly as the same can be ascertained, and subscribed and sworn to by the claimant; which certificate shall be recorded by the town clerk with deeds of land. If a party who might have filed such a certificate dies before filing the same, the executor of his will or administrator of his estate may make and lodge such a certificate within three months from the time of qualification of such executor or administrator, provided such certificate shall be lodged within six months from the decease of the original claimant.

Sec. 49-35. Notice of intent. Liens of subcontractors and materialmen. No person other than the original contractor for the construction, raising, removal or repairing of the building, or the development of any lot, or the site development or subdivision of any plot of land or a subcontractor whose contract with such original contractor is in writing and has been assented to in writing by the other party to such original contract, shall be entitled to claim any such lien, unless, after commencing, and not later than sixty days after ceasing, to furnish materials or render services for such construction, raising, removal or repairing, he gives written notice to the owner of such building that he has furnished or commenced to furnish materials, or rendered or commenced to render services, and intends to claim a lien therefor on such building, lot or plot of land; which notice shall be served upon such owner, if he resides in the same town in which such building is being erected, raised, removed or repaired or such lot is being improved, or such plot of land is being improved or subdivided, by any indifferent person, by leaving with him or at his usual place of abode a true and attested copy thereof. If such owner does not reside in such town, but has a known agent therein, such notice may be so served upon such agent, otherwise it may be served by any indifferent person, by mailing a true and attested copy of such notice to such owner at the place where he resides. When there are two or more owners, such notice to one of them shall be notice to all. Such notice, with the return of the person who served it endorsed thereon, shall be returned to the original maker thereof within said period of sixty days. No subcontractor, without a written contract complying with the provisions of this section, and no person who furnishes material or renders services by virtue of a contract with the original contractor or with any subcontractor, shall be required to obtain an agreement with, or the consent of, the owner of the land, as provided in section 49-33, to enable him to claim a lien under this section.

Sec. 49-36. Liens limited; apportionment; payments to original contractor. No such lien shall attach to any building or its appurtenances, or to the land on which the same stands, or any lot, or any plot of land, in favor of any person, to a greater amount in the whole than the price which the owner agreed to pay for such building and its appurtenances or the development of any such lot, or the development of any such plot of land. When there are several claimants and the amount of their united claims exceeds such price, the claimants, other than the original contractor, shall be first paid in full, if the amount of such price is sufficient for that purpose; but, if not, it shall be apportioned among the claimants having such liens, other than the original contractor, in proportion to the amount of the debts due them respectively; and the court having jurisdiction thereof, on application of any person interested, may direct the manner

in which such claims shall be paid; but, in determining the amount to which any lien or liens shall attach upon any land or building, or lot or plot of land, the owner of such land or building or lot or plot of land shall be allowed whatever payments he has made, in good faith, to the original contractor or contractors, before receiving notice of such lien or liens. No payments made in advance of the time stipulated in the original contract shall be considered as made in good faith, unless notice of intention to make such payment has been given in writing to each person known to have furnished materials or rendered services at least five days before such payment is made.

Sec. 49-37. Dissolution of mechanic's lien by substitution of bond. Joinder of actions on claim and bond. Whenever any mechanic's lien has been placed upon any real estate pursuant to sections 49-33, 49-34 and 49-35, the owner of such real estate, or any person interested therein, may make an application to any judge of the superior court or of the court of common pleas that such lien be dissolved upon the substitution of a bond with surety, and such judge shall order reasonable notice to be given to the lienor of such application. If such lienor is not a resident of the state, such judge may order notice to be given by publication, registered or certified letter or personal service. If such judge is satisfied that the applicant in good faith intends to contest such lien, he shall, if the applicant offers a bond, with sufficient surety, conditioned to pay to the lienor or his assigns such amount as a court of competent jurisdiction may adjudge to have been secured by such lien, with interest and costs, order such lien to be dissolved and such bond substituted therefor and shall return such application, notice, order and bond to the clerk of the superior court for the county wherein such lien is recorded; and, if the applicant, within ten days from such return, causes a copy of such order, certified by such clerk, to be recorded in the town clerk's office where such lien is recorded, such lien shall be dissolved. Whenever a bond is substituted for any lien after an action for the foreclosure of a lien has been commenced, the plaintiff in such foreclosure may amend his complaint, without costs, so as to make the action one upon such bond with which the plaintiff may join an action to recover upon his claim. Whenever a bond is substituted for any lien before an action for the foreclosure of the lien has been commenced, the plaintiff may join the action upon the bond with an action to recover upon his claim. Whenever a bond has been substituted for any lien, pursuant to this section, unless an action is brought to recover upon such bond within two years from the date of recording the certificate of lien, such bond shall be void.

Sec. 49-38. Lien on railroad for services or materials in construction. If any person has a claim for materials furnished or services rendered for the construction of any railroad, or any of its appurtenances, under any contract with or approved by the corporation owning or managing it, such railroad shall, with its real estate, right-of-way, material, equipment, rolling stock and franchises, be subject to the payment of such claim; and such claim shall be a lien on such railroad, railroad property and franchises, and such lien shall be asserted, perfected and foreclosed in all respects in accordance with the provisions of sections 49-34 to 49-37, inclusive, except that the certificates of the lien and of its discharge shall be filed in the office of the secretary of the state, who shall record them in a book kept for that purpose.

Sec. 49-39. Time limitation of mechanic's lien. Action to foreclose privileged. No mechanic's lien shall continue in force for a longer period than four years after such lien has been perfected, unless the party claiming such lien commences an action to foreclose the same and files a notice of lis pendens in evidence thereof with the town clerk within two years from the date such lien was filed with such town clerk. Each such lien, after the expiration of such two-year period without action commenced and notice thereof filed as aforesaid, shall be invalid and discharged as a matter of law. An action to foreclose a mechanic's lien shall be privileged in respect to assignment for trial.

Sec. 49-40. Record of discharge of mechanic's and judgment liens. Section 49-40 is repealed.

Sec. 49-40a. Mechanic's and judgment liens expired by limitation of time. Any mechanic's lien which has expired because of failure to comply with the time limitations of section 49-39 or any judgment lien which has expired for failure to comply with the time limitation of section 49-46 shall be automatically extinguished and the continued existence of such lien unreleased of record shall in no way affect the record owner's title nor the marketability of the same.